Supreme Court of the United States

October Term, 1960

No. 206

GENERAL FOODS CORPORATION, MAXWELL HOUSE DIVISION,

Petitioner,

against

S.S. MAMACOCHE, her engines, boilers, etc., and MARINE MCCORMICK LINES, INC.,

Respondents.

H.L. MCKISSICK CO., INC.,

Petitioner,

against

S.S. MAMACOCHE, her engines, boilers, etc., and MARINE MCCORMICK LINES, INC.,

Respondents.

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Supreme Court of the United States

October Term, 1960

No. 266

GENERAL FOODS CORPORATION, MAXWELL HOUSE DIVISION,

Petitioner,

—against—

S.S. MORMACSURF, her engines, boilers, etc., and MOORE-McCORMACK LINES, INC.,

Respondents.

H. L. McKINNON CO., LTD.,

Petitioner,

—against—

S.S. MORMACSURF, her engines, boilers, and MOORE-McCORMACK LINES, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioners show no basis for certiorari. They state, pages 2-3, that the questions presented are whether the doctrine of voyage in stages applies and whether the requirement of seaworthiness in §1303(1) of the Carriage of Goods by Sea Act (46 U. S. C. §1301) overrides the exemptions in §1304. Both courts below found the vessel seaworthy in fact when the voyage began. Therefore there was, and is, no occasion to consider whether §1303(1) over-

rides (1304. Moreover, as the Court of Appeals said (Petition, p. 41), it is academic to consider the voyage in stages doctrine because any defect in the swing bolts was repaired in Brooklyn before the Boston stage began.

Petitioners claim no conflict of decisions in the Circuits. There is none and the Fifth expressly agrees with the Second. *Leon Bernstein Company* v. *Wilhelmsen*, 232 F. 2d 771 (1956).

Nor is there any conflict, as claimed, between the decision below and that of the Privy Council in *Maxine Footwear Company Ltd.* v. *Canadian Merchant Marine Ltd., The Marieanne* [1959], A. C. 589; *infra*, page 5.

The Facts

In the District Court the case was tried on fact issues, as follows:

Petitioners' surveyor freely examined respondent's vessel immediately upon her return to New York from Montreal. The only unseaworthiness he claimed to find was that certain bolts intended to hold down the deep tank cover were missing, thus allowing the water to rise into the space above and damage petitioners' cargo. The Court found that the vessel was seaworthy when the voyage began, that certain bolts later found missing were replaced at New York, before the vessel went to Boston. The Court found that the cargo damage occurred because the chief officer, who was ballasting the vessel to eliminate a severe drag, mistakenly read an ullage (29 feet for 26 feet) and permitted the engineers to pump too long, the resulting pressure breaking off several of the bolts (those found missing by petitioners' surveyor), bursting open the deep tank cover, and forcing the water to rise into the space above and damage the cargo.

The case turned in both courts on this fact issue. Both decided this fact issue for respondent (242a-243a; 290a-294a; Opinion of Court of Appeals, Petition, p. 41).

Voyage in Stages

Under the Act, the warranty of seaworthiness applies prior to and at the beginning of the voyage, and not thereafter. Petitioners' argument that respondent's duty in respect of seaworthiness was renewed at each stage of the voyage is contrary to the plain language of §1303(1) of the Act and misapprehends the "voyage in stages" doctrine. The measure of the carrier's duty is the fitness of the vessel to perform the voyage when the seaworthiness warranty speaks, i.e., "before and at the beginning of the voyage." Title 46 U. S. Code §1303(1). As L. Hand, *C.J.*, said in *The Steel Navigator*, 2 Cir., 23 F. 2d 590:

> "The covenant of seaworthiness is to be determined when the ship breaks ground and only then. * * * It is measured by her fitness in all respects to fulfill the purposes of the voyage as then contemplated" (591-2).

The duty in respect of seaworthiness is not literally as strict as stated above because the carrier may benefit from the doctrine of voyage in stages. This means that the carrier may fulfill its obligations in respect of seaworthiness as contemplated when the voyage began by making the vessel fit at any subsequent port for the stage of the voyage immediately following. Judge Hand defined the voyage in stages doctrine in *The Steel Navigator*, *supra*, as follows:

> "Hence, if applied with literal strictness, a ship must from the outset be fitted in hull and gear for every stage of her voyage when she first breaks ground. This would in many cases be an onerous and ill-be imp-

> sition, because the earlier stages of a voyage may not require what becomes necessary thereafter. Hence has arisen in England the doctrine of a voyage in stages, marked by ports of call. This, as we understand it, means no more than that, when the demands upon her change as the voyage proceeds, she satisfies her covenant if she is fit at any port for that leg of the voyage immediately following" (592).

The voyage in stages doctrine does not increase the carrier's duties in respect of seaworthiness. As Judge Hand said in *The Steel Navigator, supra*:

> "However, it is essential to observe that, instead of imposing new burdens on the ship, it relieves her of what would otherwise be her duty, construed with verbal strictness. Especially is it necessary to remember that the measure of what can in any event be demanded of her is her fitness for the whole voyage as contemplated at the outset" (592).

Petitioners now argue that the failure to remove the cap and plug from the vent and discharge lines after cargo was discharged at Philadelphia was unseaworthiness in breach of the warranty. The District Court did not regard this circumstance as involving unseaworthiness (294-5a) and the Court of Appeals did not consider the point worth mentioning—for good reason. As L. Hand, *C.J.*, said in *The Steel Navigator, supra*:

> "Adjustments made necessary by subsequent events pertain to her management and cannot touch her seaworthiness" (p. 592).

Petitioner's Cases Distinguished

In *The Maurienne* [1959], A. C. 589, *supra*, the vessel, while still loading cargo and before the voyage began, i.e., before she sailed, caught fire and it became necessary to scuttle her at her loading berth. The carrier contended that the warranty of seaworthiness spoke as of the time of loading cargo and that the warranty had been discharged as to shipments loaded before the fire started. The court held that the warranty lasted until the ship broke ground. It did not hold, as petitioners imply, that the obligation to exercise due diligence continued after the voyage began.

In *The Glymont*, 2 Cir., 66 F. 2d 617, a shipowner sought to relieve itself of liability for unseaworthiness resulting from insufficient fuel supplied at a port of call for a succeeding stage of the voyage. The court held that the lack of sufficient bunkers for the whole voyage, not cured at an intermediate stage, was unseaworthiness and that the shipowner was liable for resulting damage.

The measure of seaworthiness can be no greater than the fitness of the vessel for the whole voyage as contemplated at the outset. The owner's duty is not lessened, but only deferred, when a detail of initial fitness is postponed under the voyage in stages doctrine. This is precisely the holding of the Third Circuit in *The Willdomina*, 300 Fed. 5, aff'd 272 U. S. 718.

In *The Elkton*, 2 Cir., 49 F. 2d 709, when sugar was loaded at Manila and Iloilo, there were leaky rivets, a defective seam in a double bottom tank and a broken vent pipe, and the ship's officers were ignorant that these unseaworthy conditions existed. These deficiencies permitted oil and water to enter the cargo compartments, damaging the sugar. The court denied the carrier an error in manage-

ment exemption because it had failed to exercise due diligence to make the vessel seaworthy prior to sailing.

Petitioners' contention that the ballasting which caused the damage to petitioners' cargo was negligence in care and custody of the cargo and not error in management of the ship, is only a last ditch protest against concurrent findings below that the primary purpose of this ballasting was the welfare of the entire ship in reducing a serious drag. Both courts below have held that the purpose of ballasting pertained to the trim of the whole vessel and not to cargo, and was "management." In *The Germanic*, 196 U. S. 589, both lower courts had held, on the facts, that the purpose of ballasting there was the handling of cargo. This Court refused to review the concurrent findings there (as it should here), but said:

> "If the primary purpose is to affect the ballast of the ship, the change is management of the vessel * * *" (p. 597).

This case was decided on the facts by both courts below. These facts do not present any question as to the overriding importance of (1303(1) of the Carriage of Goods by Sea Act because the vessel was found in fact seaworthy. The real question here is purely one of fact, of no importance except to these petitioners. There is no conflict between the decision below and of any other court.

The petition should be denied.

Respectfully submitted,

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Dated: New York, N. Y.
July 20, 1960